

NTSB Order No. EA-3787

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD  
at its office in Washington, D.C.  
on the 27th day of January, 1993

Respondent .

Docket SE-12821

The Board in Order EA-3753, served December 18, 1992, affirmed an emergency order of the Administrator revoking the respondent's private pilot certificate for several alleged violations of the Federal Aviation Regulations (FAR) involving, among other things, his reckless operation of an overweight aircraft. Because of the time constraints that apply to emergency cases,<sup>1</sup> Order EA-3753 dealt exclusively with the appeal the Administrator had taken from the law judge's decision on sanction; it did not rule on a motion respondent filed on

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December 14, 1992, more than three weeks after the hearing, which asked the Board to dismiss the complaint on the ground that certain testimony given before the law judge was tainted by misconduct on the part of counsel for the Administrator.<sup>2</sup> We find it unnecessary to consider the merits of the respondent's motion, for we have concluded, for the reasons discussed below, that it is in effect a late appeal whose untimeliness is not excusable for good cause shown.<sup>3</sup>

In his motion respondent asserts that his wife and one of his defense witnesses overheard, on leaving the courtroom at the beginning of a lunch recess on the first day of the hearing, statements by the Administrator's counsel that were intended to make the Administrator's witnesses, seated in the hallway outside the courtroom, "coordinate their testimony," despite the law judge's admonition that they not discuss the case among themselves or with others. The motion further asserts that neither the respondent nor his attorney was made aware of this alleged impropriety until "well after the hearing," namely, during the time within which a reply brief to the Administrator's appeal was being prepared. Memorandum in Support of Motion at 5.<sup>4</sup>

Under Section 821.57(a) of the Board's Rules of Practice, 49 CFR Part 821, a party in an emergency case must file a notice of appeal within 2 days after the law judge renders his oral initial decision. While the belated receipt of information pertinent to a decision on whether to appeal in some circumstances could constitute good cause for accepting an appeal out of time, it cannot justify accepting a late appeal that was not filed immediately after a party became aware of such information. Here, respondent took at least 10 days, and perhaps more than two weeks, to submit to the Board the serious accusations presented in his motion.<sup>5</sup> Respondent has not adequately explained why he

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<sup>2</sup>On December 16, the Administrator filed a response opposing the respondent's "Motion to Strike Testimony and Enter Dismissal of the Amended Emergency Order of Revocation."

<sup>3</sup>We should point out, nevertheless, that counsel for the Administrator has vigorously denied any improper attempt, in contravention of the law judge's sequestration order, to orchestrate the collaboration of his witnesses' testimony.

<sup>4</sup>Respondent's reply brief, which makes no mention of any suspected misconduct by the Administrator's counsel during the hearing, was filed December 4, 1992.

<sup>5</sup>Respondent's counsel asserts that he could not file the motion any sooner than he did because he had to investigate the matter, perform research, and prepare the motion and supporting documents. Given the tight appeal deadlines that would have applied if he had learned of the problem immediately after the

delayed so long in filing his motion, and he has provided no justification for failing to seek leave to file what amounted to a late appeal as soon as he learned of conduct by the Administrator's counsel which he obviously believed early on should have a significant bearing on the Board's consideration of the law judge's decision.

In sum, respondent has not in this case established good cause for an extension of the time limit for submitting an appeal or other request for relief from the initial decision. We will not, therefore, entertain his tardy claims.

**ACCORDINGLY, IT IS ORDERED THAT:**

Respondent's "Motion to Strike Testimony and Enter Dismissal of the Amended Emergency Order of Revocation" is dismissed.

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HART and HAMMERSCHMIDT, Members of the Board, concurred in the above order.

(..continued)

hearing (two days to file an appeal and five more days to file a brief), he clearly had no reason to expect more lenient appeal deadlines for an issue that he learned about even later in the 60-day statutory process. Moreover, he did not have to wait until completing his preparation of the motion before either notifying the Board of the problem and requesting late acceptance of the motion, or requesting that the Administrator's appeal be processed under non-emergency procedures.